

DECISION



12612 K. M. ...
Proc
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-195956

DATE: January 23, 1980

MATTER OF: Werner-Herbison-Padgett DLG 03672

[Protest Alleging that Awardee's Bid Was Nonresponsive]
DIGEST:

1. Protest alleging required drawings accompanying competitor's low bid did not comply with specifications need not be filed before protester knew or should have known that agency found such drawings to comply, since earlier protest would necessarily be defensive in nature and based on anticipation that agency's evaluation would be erroneous.
2. Where solicitation required strict conformance of product to specification which is to be shown by drawings submitted with bid, drawings offering product not in accordance with specifications raises issue of responsiveness rather than responsibility. Drawings showing wall thickness of racquetball courts approximately 28 percent less than specified result in bid being nonresponsive since defect cannot reasonably be considered minor or having only insignificant effect on quality.
3. Trade or business practice or procedure may not supersede or alter clear and unambiguous terms of solicitation.

DLG 03673 Werner-Herbison-Padgett (WHP) protests the award of a contract for construction of racquetball courts to Charles H. Reed Export, Inc. (Reed), by the Army Corps of Engineers, pursuant to invitation for bids AGCO (IFB) No. DACA51-79-B-0055.

WHP contends that Reed is nonresponsible because, among other things, that firm is an export firm relying entirely on subcontractors and lacking technical and financial qualifications and is not a regular dealer

00 8377

or manufacturer within the meaning of the Walsh-Healey Act, 41 U.S.C. §§ 35-45 (1976). WHP also contends the low bid of Reed was nonresponsive because design drawings and details submitted with the bid did not show compliance with the specifications as required by the IFB.

The bid opening on July 24, 1979, was attended by a WHP representative who examined Reed's bid and its enclosures. WHP's protest was received in this Office on September 5, 1979.

Our Office does not consider issues as to whether a bidder is a regular dealer or manufacturer within the meaning of the Walsh-Healey Act, since such matters are by law for the contracting agency's determination in the first instance, subject to the Secretary of Labor's review. Schering Corporation, B-193872, March 30, 1979, 79-1 CPD 221. Where the status of a small business is challenged, Section 501 of Pub. L. 95-89, 91 Stat. 561, amending section 8(b) of the Small Business Act of 1958, requires the Small Business Administration to rule on the issue as to whether a bidder is a regular dealer or manufacturer and to forward a finding of non-qualification to the Secretary of Labor for final determination. Bethpage Industries, Inc., B-189912, January 20, 1978, 78-1 CPD 54; Charles J. Dispenza and Associates, B-190660, February 6, 1978, 78-1 CPD 102. Moreover, this Office does not review affirmative determinations of responsibility except where the protester alleges fraud on the part of procuring officials or where the solicitation contains definitive responsibility criteria which allegedly have not been applied. School Transportation Co., Inc., B-192799, January 10, 1979, 79-1 CPD 12. Neither exception applies here.

The Army contends that as the protest was filed approximately 25 working days after bid opening, it is untimely under our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(2) (1979), which require protests to be filed not later than 10 working days after the basis for protest is known or should have been known. However, timeliness is not measured from bid opening, as we believe grounds for protest do not arise until the protester has learned of agency action or intended action which is inconsistent with what the protester believes to be incorrect or inimical to its interest.

See, e.g. Action Manufacturing Company, B-186195, November 17, 1976, 76-2 CPD 424; Carco Electronics, B-186747, March 7, 1977, 77-1 CPD 172. There is no indication in the record that WHP did not protest within 10 working days of the time it learned the Army had found Reed's bid to be acceptable. Thus, resolving any doubts with respect to timeliness in favor of the protester, we find the protest timely. Ikard Manufacturing Company, B-192578, February 5, 1979, 79-1 CPD 80.

During its technical review of Reed's drawings, the Army noted that they showed a thickness of 13/16 inch for the side and rear wall panels of the racquetball courts where the specifications required a thickness of 1 1/8 inches. It was determined that this was a minor or insignificant deviation and within an acceptable tolerance for side and rear wall panels according to current racquetball industry practice. At the request of the Army, Reed submitted revised drawings showing a thickness of 1 5/32 inches for all wall panels. The Army contends that as the specifications were clearly performance specifications and the bidders were not advised that failure to submit the drawings prior to bid opening would result in rejection of the bid, the drawings clearly relate to responsibility rather than responsiveness. We do not agree.

There is a definite distinction between questions related to bid responsiveness and those concerned with bidder responsibility. "Responsibility" as employed in Federal procurements refers to a bidder's ability or capacity to perform all of the contract requirements within the limitations prescribed in the solicitation. "Responsiveness" concerns whether a bidder has unequivocally offered to provide the product in total conformance with the material terms and specifications of the solicitation. J. Baranello and Sons, 58 Comp. Gen. 509 (1979), 79-1 CPD 322. The determination of responsiveness must be made from the bid documents as of the time of opening. Lift Power Inc., B-182604, January 10, 1975, 75-1 CPD 13.

When data is needed to determine a bidder's ability and capacity to perform a contract, failure to submit such data with the bid, even though the IFB may so require, does not compel rejection of the bid.

Because the need relates to a bidder's responsibility, the data may be furnished after bid opening up to the time of contract award. 52 Comp. Gen. 389 (1972); Thermal Control Inc., B-190906, March 30, 1978, 78-1 CPD 252. When data is needed to determine if the product offered will comply with the specifications, the need relates to responsiveness and the failure to provide the data or the provision of data showing compliance with the specifications, requires bid rejection because a nonresponsive bid cannot be made responsive after bid opening through the submission of additional information. 46 Comp. Gen. 434 (1966).

The solicitation required the courts to be "in strict accordance" with the specifications and further required submission of construction drawings which were to be in sufficient detail to indicate compliance therewith. The solicitation also provided that any exceptions or qualifications to its conditions will be cause for disqualification. Although the specifications were called "performance specifications," they contained detailed design, material and dimensional requirements with no indication of acceptable tolerances within which a bidder could deviate. Moreover, it is an established legal principle that a trade or business practice or procedure, such as the one the Army apparently relied upon here, may not supersede or alter the clear and unambiguous terms of the solicitation. The Murphy Elevator Company, Incorporated, B-180607, April 2, 1974, 74-1 CPD 164. We believe the drawings were clearly required in order to evaluate the compliance of the courts with the specifications and that they relate to responsiveness rather than to responsibility. Moreover, even if the drawings were requested to aid in the determination of responsibility, they may nevertheless render a bid nonresponsive where, as here, they indicate that the bidder does not intend to comply with a material IFB requirement. Palmetto Enterprises, Inc., et al., B-193843, August 2, 1979, 79-2 CPD 74; Test Drilling Services Co., B-189682 September 15, 1977, 77-2 CPD 193.

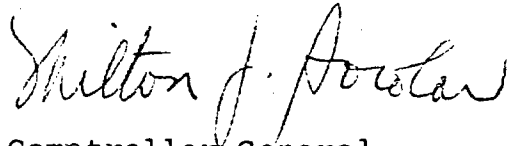
While it is true minor deviations having only an insignificant effect on price, quantity, quality or relative standing of the bidders can be cured or waived, we do not believe that a bid offering panels approximately 28 percent thinner than the specifications

require can reasonably be considered as deviating in a "minor" respect or as having an insignificant effect upon quality. 51 Comp. Gen. 518 (1972). Moreover, the Army did not accept the bid as submitted but required Reed to revise its drawings and now intends to make an award based on drawings showing a panel thickness in excess of that specified. Such a required revision seems inconsistent with a position that the deviation was minor or insignificant.

Defense Acquisition Regulation (DAR) § 202.5(b) provides that descriptive literature shall not be required unless it is needed to determine before award whether the product offered meets the specifications and to establish exactly what the bidder proposes to furnish. DAR § 2-202.5(d)(1) provides that when such literature is required, the IFB must clearly state the purpose for which it is required, the extent to which it will be considered in the evaluation and the rules which will be applied if a bidder fails to furnish it before bid opening or if it does not comply with IFB requirements. Moreover, the IFB must contain a provision substantially as in DAR § 7-2003.31 when the descriptive literature is required. DAR § 2-202.5(d)(2). That provision specifically states failure to furnish the data or failure of the data to show compliance with the specifications will require rejection of the bid.

Although, as pointed out above, the IFB here clearly stated the drawings were required to determine compliance with the specifications and that any exceptions or qualifications to the IFB conditions would be cause for disqualification, the IFB did not contain the provision set out in DAR § 7-2003.31(a). While the absence of the required provision may indicate a procedural deficiency, such a deficiency does not alter the fact that the drawings were required explicitly to determine compliance of the product offered with the specifications nor does it convert a matter of responsiveness to one of responsibility. Thus, we do not agree that the lack of an explicit statement in the IFB to the effect that the failure to submit drawings would render a bid nonresponsive demonstrates that the drawings were only an aid to determining whether a bidder understood the specifications.

Accordingly, we conclude that Reed's bid must be rejected as being nonresponsive and this protest is sustained. By letter of today, we are recommending to the Secretary of the Army that this procurement be reviewed in light of our decision and that Reed's bid not be accepted.

A handwritten signature in cursive script, reading "Milton J. Fowler".

For The Comptroller General
of the United States